

APPEAL NO. 020469
FILED APRIL 17, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 28, 2002. With regard to the issue before her the hearing officer determined that the appellant (claimant herein) has an 8% impairment rating (IR) based upon the report of a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals, contending that the hearing officer erred in relying on the report of the designated doctor as to IR because the designated doctor did not properly apply Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) in assessing IR. The claimant also complains that the hearing officer should have considered medical literature which she excluded from evidence. The respondent (carrier herein) replies that the hearing officer did not err in relying on the designated doctor's assessment of IR.

DECISION

Reversed and remanded.

It was undisputed that the claimant suffered a compensable injury to his low back on _____, and attained maximum medical improvement on June 14, 2001. Dr. M, the claimant's treating doctor, initially certified that the claimant had an 18% IR based upon a 7% whole body impairment for specific disorders from Table 49, Section (II)(C) of the AMA Guides combined with a 12% whole body impairment for loss of range of motion (ROM). Dr. M later amended his opinion to a 25% IR when he added additional impairment for the Intra Discal Electro Thermal Treatment (IDET) the claimant underwent on April 19, 2001. Dr. K, the designated doctor chosen by the Commission, certified that the claimant's IR was 8%. Dr. K's IR consisted of 7% whole body impairment from Table 49, Section (II)(C) of the AMA Guides combined with 1% whole body IR from loss of ROM. The Commission requested clarification from Dr. K based upon criticisms of Dr. K's IR assessment by Dr. M. Dr. K responded to all requests for clarification and stated that he continued to assess the claimant's IR as 8%.

Section 408.125(e) provides:

If the designated doctor is chosen by the commission, the report of the designated doctor shall have presumptive weight, and the commission shall base the [IR] on that report unless the great weight of the other medical evidence is to the contrary. If the great weight of the medical evidence contradicts the [IR] contained in the report of the designated doctor chosen by the commission, the commission shall adopt the [IR] of one of the other doctors.

We have held that no other doctor's report, including the report of the treating doctor, is accorded the special, presumptive status accorded to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992; Texas Workers' Compensation Commission Appeal No. 93825, decided October 15, 1993.

The 1989 Act requires that any determination of IR be based upon the AMA Guides. Section 408.124. Failure by a designated doctor to properly follow the AMA Guides has led to reversal of a decision on IR based upon the designated doctor's report. See Texas Workers' Compensation Commission Appeal No. 93296, decided May 28, 1993; Texas Workers' Compensation Commission Appeal No. 93769, decided October 11, 1993; Texas Workers' Compensation Commission Appeal No. 931008, decided December 16, 1993; and Texas Workers' Compensation Commission Appeal No. 94181, decided March 24, 1994. We do not find merit in the claimant's contention that the AMA Guides required further retesting of his ROM or required that the designated doctor in this case assess IR for neurological deficits. Nor do we find that the hearing officer's exclusion of the medical literature articles offered by the claimant constituted harmful error. See Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

However, we must agree that the designated doctor failed to properly apply the AMA Guides when he failed to assess impairment for the claimant's IDET. We have held that for purposes of IR assessment under the AMA Guides that the IDET is a surgical procedure, notwithstanding that Advisory 2001-03 states that IDET is not subject to the spinal surgery second opinion process. Texas Workers' Compensation Commission Appeal No. 012635-s, decided December 13, 2001. In light of our decision in Appeal No. 012635-s, we must reverse the decision of the hearing officer. We remand the case to her for her to seek clarification from the designated doctor after instructing him that for purposes of rating IR under the AMA Guides that IDET must be treated as a surgical procedure.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 (amended June 17, 2001). See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **UTICA NATIONAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD A. MAYER
11910 GREENVILLE AVENUE, SUITE 600
DALLAS, TEXAS 75243.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Thomas A. Knapp
Appeals Judge